UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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	12-MC-00557(BMC)
IN RE MOTION FOR CIVIL CONTEMPT BY JOHN DOE	U.S. Courthouse Brooklyn, New York
	Tuesday, May 10, 2016 2:15 p.m.

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Also Present:	ROBERT L. CAPERS, ESQ. United States Attorney 271 Cadman Plaza East Brooklyn, New York 11201 BY: EVAN NORRIS, ESQ. KARTHIK SRINIVASAN, ESQ. Assistant U.S. Attorneys
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THE COURTROOM DEPUTY: In re motion for civil contempt, docket number 12-MC-557. Counsel, please state your appearances starting with the movant.

MS. BOLGER: Your Honor, my name is Katherine Bolger from the law firm of Levine, Sullivan, Koch & Schulz on behalf The Associated Press.

THE COURT: Okay.

MR. HOFFMAN: Good afternoon, Your Honor, Jeff Hoffman, Blank Rome for Mr. Oberlander.

MR. LERNER: Richard Lerner, pro se.

MR. BEYS: Your Honor, I think the movant you were referring to is John Doe. I am Mike Beys with the firm of Beys, Liston, Mobargha & Berland for Mr. Doe who everybody now knows is Felix Sater. And I'm joined by co-counsel Robert Wolf with the firm of Moses & Singer, Robert McFarlane with Moses & Singer. Good afternoon, Your Honor.

MR. NORRIS: Your Honor, and from the U.S. Attorney's Office in the Eastern District of New York, Evan Norris and Karthik Srinivasan. We are joined today by our colleagues from the Northern District of New York, Stephen Green and Richard Bellis. Good afternoon.

THE COURT: Good afternoon, everybody. All right, here is what is on my agenda today. I have motions to unseal by the intervenors, the Associated Press and someone named Mr. Modica. Is he here? He didn't come?

MR. HOFFMAN: I think he's --

THE COURT: Modica, he is not here?

MR. HOFFMAN: He's not here.

THE COURT: I am going to first make a few rulings on the issue of unsealing certain documents, and then once I do that, I will give anybody from the public who might be here and wants to be heard an opportunity to try to convince me that I should do something other than what I am inclined to do.

By way of background, let me just note that there are certain documents in federal court that are routinely sealed whether for short periods of time as to certain nonparties or even as to the parties themselves. As it relates to the case here, both according to the rules and the statute, the presentence report, what we call the PSR, that is invariably sealed in the case. The information contained in that report is placed there by the Probation Department after its own investigation and its conversations with the defendant in a particular case and the defendant's attorney, of course.

The report is prepared by Probation as an arm of the court. The report is for the Court's benefit. And sometimes there are portions of a presentence investigation report like the recommendation that even the defendant is not permitted to see and the government is not permitted to see. That is up to the Court to determine that.

The reason for this is that you often have concerns about safety, particularly when you are dealing with cooperating witnesses. You also have concerns about compromising what may be ongoing government investigations. And it is also quite clear that if defendants understood that what they were telling the Probation Department was going to be made public, then they would not tell as much. And as sentencing judges, I and my colleagues would have a very difficult time in applying 18 U.S.C. Section 3553(a) to determine what the appropriate sentence is.

So it is common to the point of being universal that presentence reports are required to be sealed. There are occasions when they can be unsealed, but it is a strong showing that has to be made to the Court that there is some compelling interest that overrides the statutory default of having them sealed.

There are many other documents, especially when you are dealing with cooperators, that routinely get sealed. When the government gives me a 5K1.1 letter that is a motion advising me of the kind of cooperation that the defendant has given, that is almost invariably sealed. The government in those letters requests sealing and the Court makes findings that, because of the nature of the information, the threat to continuing investigations or the cooperator's safety is always at issue.

And then there are a bunch of other matters that always get sealed like the sentencing memoranda that might refer to the 5K1 letter and the presentence investigation report. Those don't get sealed all the time. Sometimes they are; sometimes they are not. Again, it is the interest of the public in having its qualified right of access versus the interest of the government in continuing investigation, and the interest in the defendant of not being physically harmed.

Now, with that background, let me talk to you a little bit about how we got here. I have the contention, I have had it throughout the case from Mr. Oberlander and Mr. Lerner that everything should be unsealed without individual consideration given as to each document.

Here is how we came to this place. I was designated by the Circuit a Special Master in this case. The Second Circuit had enjoined all parties and all persons acting in concert from publicly distributing or revealing in any way to any person in any form documents that were subject to sealing.

My mandate in the case is pretty limited, which is I have to implement and oversee the injunctions that the Circuit issued and that Judge Glasser also issued and I think at this point I have issued some of my own injunctions in furtherance of theirs.

During the course of the proceedings before me or leading up to them, people, allegedly Mr. Lerner and

Mr. Oberlander, got access to or retained copies of the PSR or other documents useful or used in Mr. Sater's proceeding where he was a cooperating witness. That led to civil contempt motions by Mr. Sater and the criminal contempt referrals by me to the Eastern District Prosecutor's Office, which then I understand has referred those for its own reasons to the Northern District office.

Based on what was placed before me, it seemed to me that Mr. Sater had made at least a prima facie case that Mr. Lerner and Mr. Oberlander had violated the injunctions and that the parties' use of the dockets with these papers were being filed could exacerbate the issue of releasing sealed information to the public.

Now, Mr. Lerner and Mr. Oberlander as alleged by Mr. Sater had made a practice of republication by which they bootstrapped their own disclosures as a reason for making more disclosures. And their point and the point they made to me and they are still making it to me was that since the information is already public, what is the harm in letting it out again or even embellishing it with additional details.

The Second Circuit, however, recognized the danger of this when it enjoined Mr. Oberlander from even using his own name in these proceedings because his name became synonymous with the disclosure of the information. So I couldn't have the parties filing things on the docket in front

of me that were open to the public which would do the very harm that the Second Circuit's injunction was meant to prevent.

And specifically what the Circuit held was this, "Roe," referring to Mr. Oberlander, "is an attorney at law whose identity is known to all participants in this litigation and who has been given the name Richard Roe" -- I'm sorry; that's Mr. Sater -- "as a legal placeholder because the disclosure of his true identity in this litigation may for the time being lead to the improper disclosure of the materials at issue."

Now, the Circuit was prescient in using the phrase "for the time being," for as Mr. Beys just made clear, we all know who we are talking about and there is no point not using the names Sater or Oberlander or Lerner in this case because we all know who they are.

But what I was faced with was what has been called, at least the allegations were that there was a camel's-nose-under-the-tent strategy, whereby by releasing certain sealed information it would be okay to release all the sealed information because the deed had already been done. And I wasn't going to make a Court a party to that, so I directed that everything on the docket had to be sealed. That is how we got here.

Now, at the present time, there are two separate

issues before me in this case. The first issue is the pending contempt motion brought by Mr. Sater and a potential indictment or information for criminal contempt. The contempt proceedings go to the issue of whether Mr. Oberlander and Mr. Lerner violated the injunctions that Judge Glasser in the Second Circuit issued. I haven't found anything in those allegations. Like I said, there is a prima facie case, but I have made no findings of fact as to whether that has occurred.

The second issue is whether the documents currently under seal should remain under seal. I feel like it bears repeating, though, that these issues, contempt or under seal, are two separate issues and how I come out on one will not necessarily affect how I come out on the other. So even if I go ahead and I unseal the documents as the intervenors have asked me to do, that does not in any way bear on what may be found to be civil or criminal contempt by Mr. Oberlander or Mr. Lerner, nor does it mean that the injunctions that are in place are in any way vitiated by any unsealing that I might order.

What I am not going to allow to happen is this bootstrapping whereby unsealing, it becomes okay to talk about them. If they are unsealed because it is futile to keep them sealed, that's fine. But the injunctions remain in effect and if there are violations by Mr. Oberlander and Mr. Lerner at this point, then they will still be treated as contempts of

court and prosecuted accordingly.

Now, how are we going to go about this? My analysis of whether documents in the action are going to remain under seal requires me to compare the information that is sealed with the information that is currently in the public domain. That is to say that the mere fact that the Second Circuit has sealed documents or upheld Judge Glasser's sealing of documents does not end the inquiry here.

The government and Mr. Sater may rely on the interests that were cited at the time of those decisions and say that those interests are still present and still outweigh the public's qualified right of access. But I am not going to require them to prove the negative of that. That is, they don't have to prove that the parties who request continued sealing are not required -- let me put it this way.

As the parties who are requesting continued sealing, they do not have to prove that the circumstances have not changed. Rather, it is incumbent on those who seek the unsealing, Mr. Oberlander and Mr. Lerner or any other party, to show to me that those interests are no longer controlling or no longer balance the way I originally did them.

I want to mention something at this point about certain proceedings that are pending in Israel. I understand, and I don't know the details, but I know some of these documents have not been disclosed in Israel in some fashion,

in some judicial or quasi-judicial proceeding. I do not know and I have not received any definitive legal showing that those documents have been made public, and I am not going to treat them like they have been made public in Israel when I have not been shown that.

Now, having said that, keep in mind what I did hear when I first sealed the docket was it was basically, I was not going to rely on Mr. Oberlander and Mr. Lerner to file documents that were redacted or that requested sealing, because the concern was they were going to file documents that disclosed the very matters they were enjoined from revealing. I therefore sealed that docket.

But what I then did was I created a second docket, and to the extent the parties' filings on the first docket did not strike the balance that I found for keeping those matters sealed, essentially protection of cooperators and threat to potential government investigations, I then moved them over to the public docket where they reside now in and anyone can get access to those.

Having gone through all of the documents now on the public and the private documents, there are something like, I think it is about 280 documents that have been filed under seal. I am releasing all of those documents and making them public except for 38 of them, which I find continue to reflect and would deter cooperation and might jeopardize ongoing

government investigations.

And I just want to ask, I want to confirm for the record the Northern District has in effect received the referral orders for criminal contempt; is that right?

MR. GREEN: That is correct, Your Honor.

THE COURT: And I take it you are processing those in the ordinary course of your determination of what you are going to do about those, right?

MR. GREEN: If the Court permits, I would prefer to just commit to the fact that the Northern District has received those referrals and is acting in accordance with the Court's referrals.

THE COURT: That is what I meant to say, so that is fine, okay.

The only documents I am not unsealing are these. And everyone can get this transcript -- it is a list -- but you can order the transcript: Attachment 3 to Document 1; Document 7 and Attachment 2 to Document 7; Attachment 1 to Document 21; Documents 23 through 26, 39, 47, 69, 76, 78, 84 and 85, 87; Attachments 1 and 5 to Document 91; Attachments 5 and 10 to Document 97; Attachments 1, 10 and 11 to Document 112; Attachments 1 and 5 to Document 146; Document 153; Attachment 1 to Document 160; and Documents 170 through 177.

Now, like I said, that is 38 out of about 280

THE COURT: You may be right and I will gladly go back and look at those right after the conclusion of the hearing and see if I was overinclusive. As you can tell, there are, as I said, there are nearly 280 documents. It is possible that those do not contain matters that should be sealed.

But what I said was as to these documents, I may be wrong, but my view was these documents, 38 documents that I am leaving under seal do, in fact, have concerns that outweigh the public's qualified right of access. They do pose potential danger. They do potentially complicate or impede government investigations.

Now, if I am wrong on that on a specific document, I am happy to revisit it. That is why I am giving you time to put in anything you want and if you put it in tomorrow, I will look at it tomorrow. Now that you have identified 170 to 177, I will look at it as soon as we are done with this hearing.

MS. BOLGER: Your Honor, I would reiterate, and you know it, Your Honor, I wouldn't be here today, that the presumption is openness. The presumption is not sealing.

THE COURT: It is.

MS. BOLGER: And so --

THE COURT: But I get, I want to go back to the point you made about timing. You know, when I do a sentencing, and I didn't sentence Mr. Sater, but it is true of